Bourne v. *Whitman* is that lack of the license is evidence of negligent management at the time of the accident. It seems unwise to violate the character rule to such an extent in favor of evidence which might tend strongly to prejudice the jury, and which in many cases can have almost no probative value.[10]

The ground of decision in the principal case does not fit easily into any one of these theories. If the outlaw doctrine, as extended to defendants, rests on some analogy to the liability of a landlord to third persons for a nuisance on land which existed at the time of the lease,[11] or to the absolute liability of the owner of a wild beast,[12] it logically justifies holding the father liable for any harm done while the car is in his son's hands.[13] The court considers him liable, however, only for his son's negligence. This would indicate that the liability depended on principles of *respondeat superior*, a view that seems hardly tenable. By no alchemy known to the courts can the mere fact of illegality make one in law an agent who is not an agent in fact.

IS *CESTUI QUE TRUST'S* RIGHT *IN REM* OR *IN PERSONAM?* — "An use is a trust or confidence reposed in some other which is not issuing out of the land but a thing collateral annexed in privity to the estate of the land and to the person touching the land." [1] So Lord Coke in 1628 defined the right of a *cestui que trust*, a definition which few lawyers of a century ago would have dared to dispute. But in recent times there has grown up a rapidly increasing expression of opinion both among judges and text-writers that the *cestui* has more than a bare "trust or confidence" in the trustee, that he has an interest in the *res* itself, real in nature and good against everyone save a *bonâ fide* purchaser of the legal title.[2]

---

[10] As in Bourne *v.* Whitman, *supra*, where the driver's license had expired only the day before the accident and was renewed two days after.

[11] Dalay *v.* Savage, 145 Mass. 38, 12 N. E. 841.

[12] Filburn *v.* People's Palace, etc. Co., 25 Q. B. D. 258.

[13] In some jurisdictions the owner of an automobile who allows members of his family to take the car for a ride is held liable for their negligence, on some theory of agency growing out of the relationship. The cases are collected and criticised in 28 HARV. L. REV. 91. In these jurisdictions the problem of the principal case would not arise. But in Massachusetts this view is not adopted. Whether or not the driver of the car was an agent of the defendant is considered a question of fact in each case. See Bourne *v.* Whitman, 209 Mass. 155, 173, 95 N. E. 404, 408.

[1] Co. Lit. *272 b.*

[2] See Cave *v.* Cave, 15 Ch. D. 639, 647; Cory *v.* Eyre, 1 DeG. J. & S. 149, 167; Shropshire Railways, etc. Co. *v.* The Queen, L. R. 7 H. L. 496, 506, 512, 514. See SALMOND, JURISPRUDENCE, 3 ed., 230 *et seq.*; WILLOUGHBY, THE LEGAL ESTATE, ch. 1; Professor Pound in 26 HARV. L. REV. 462. Lord Mansfield's view of the nature of trusts in his dissenting opinion in Burgess *v.* Wheate, 1 Eden 177 (1759) is worthy of note (p. 226): "A use or trust heretofore was (while it was a use) understood to be merely an agreement by which the trustee and all claiming from him in privity were personally liable to the *cestui que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this court is the same as the land and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be coextensive with the legal estate of the land, and where it is not declared it results by necessary implication; because the trustee is excluded except where the trust is barred in the case of a purchaser for valuable consideration without notice."

In a recent case the Supreme Court of the United States seems to have added the weight of its authority to this modern conception. *Brown* v. *Fletcher*, 235 U. S. 589, 35 Sup. Ct. 154. The trustee and *cestui que trust* of a certain trust fund were citizens of New York. The *cestui* assigned his interest to the plaintiff, a citizen of Pennsylvania, who brought suit against the trustee in a federal District Court. Section 24 of the Judicial Code provides that the District Courts shall not have jurisdiction of "any suit to recover upon any promissory note *or other chose in action* in favor of any assignee, . . . unless such suit might have been prosecuted in such court . . . if no assignment had been made." The District Court dismissed the bill for want of jurisdiction. The Supreme Court reversed the decree apparently on the ground that the *cestui's* right under a trust was a property right and not a "*chose in action*" within § 24.[3] Has the *cestui's* right, then, really become a right *in rem?* [4]

At the outset the procedural maxim that "equity acts *in personam*" must not be confused with the substantive right itself. This manner of procedure is no doubt due to an historical accident. Courts of law were gravely defective in being unable to give specific reparation for a wrong by enforcing their judgment against the defendant personally. To correct this defect, equity seized on the procedure then in use in the Ecclesiastical Courts and acted on the conscience of the wrongdoer. But the Chancellor was early confined to this one way of enforcing his decrees by the sharp jealousy of the law courts aroused by the surprisingly rapid growth of equity practice.[5] This procedural limitation, however, has no real bearing on the true nature of the right itself.

Historically, the earliest cases of equitable rights of this kind were the uses of real property. On a feoffment to uses the feoffee acquired a complete title. He was amenable to no process whatsoever, although of course morally bound to perform.[6] But by the middle of the fifteenth century courts of equity came to recognize the *cestui's* right and to enforce it. Originally it was purely a personal obligation against the trustee and the trustee alone.[7] If the *res* was wrongfully conveyed to another with notice or for no consideration, no subpœna would issue against the

---

[3] The case might be supported on the narrower ground that a *chose in action* within § 24 means a *chose in action* based on contract. In the opinion, however, the court says: "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a *chose in action*. . . . His estate in the property then in the possession of the trustee for his benefit, though defeasible was alienable to the same extent as though in his own possession and passed by deed. . . . The instrument . . . was not a *chose in action* payable to the assignee, but an evidence of the assignee's right, title and estate in and to the property."

[4] Austin defines a right *in rem* as one which "avails against persons generally or universally," and a right *in personam* as one which "avails against certain or determinate persons." AUSTIN, JURISPRUDENCE, 3 ed., 380. See also HOLLAND, JURISPRUDENCE, 11 ed., 144; SALMOND, JURISPRUDENCE, 3 ed., 205.

[5] It remained for express statutory enactment in the early part of the nineteenth century to grant to courts of equity limited powers *in rem*. See POMEROY, EQUITABLE REMEDIES, §§ 13, 14, 15.

[6] See BACON, READING UPON THE STATUTE OF USES, pp. 20, 22, 23; 3 ROT. PARL. 511, No. 112.

[7] FITZHERBERT'S ABRIDG., tit. SUBPŒNA, pl. 19. See Y. B. 14 Hen. VIII, fol. 4, pl. 5 [AMES, CASES ON TRUSTS, 2 ed., pp. 282, 283].

transferee; or if the trustee died or married, the title descended to his heir and the widow acquired her dower free from the trust obligation.[8] But gradually the *cestui's* rights were enlarged until they began to assume characteristics closely resembling *jura in rem*. First it was held, although with some difficulty, that the heir must perform the trust.[9] Later the *cestui* was allowed to enforce his right against the donee, the purchaser with notice, the creditor, and the devisee of the trustee;[10] until now it appears that the right of the *cestui* follows the *res* into whosesoever hands it may come, save in the case of a transfer of the legal title to a purchaser for value and without notice.[11]

On first thought this power of the trustee to cut off the *cestui's* interest by a sale to a *bonâ fide* purchaser seems fatal to any *in rem* theory. The very essence of a right *in rem* is that it shall "avail against persons generally or universally." [12] Here that is not the case as regards certain individuals; so it is argued that after all the right must be only *in personam* against the trustee.[13] Yet rights may be rights *in rem* although as to some individuals they do not impose collective duties.[14] The law is not unfamiliar with instances in which legal property rights are of no avail against certain people. The sale of a chattel in market overt will give a title good against the former legal owner;[15] the transferee of money, or of a bearer bank-note, promissory note, or bill of exchange owes no duty to the original owner;[16] a subsequent deed or mortgage recorded before a prior unrecorded deed or mortgage creates a right superior to that of the prior mortgagee;[17] the owner of goods entrusted to a factor and wrongfully pledged by him to another is remediless under the Factor's Acts;[18] a vendor in possession can pass an indefeasible title to a subsequent vendee although a vested property right is thereby cut off.[19] Social welfare demands a security and stability in business trans-

---

[8] BROOK'S NEW CASES, MARCH'S TRANSLATION, 95; Y. B. 8 Ed. IV, fol. 6, pl. 1 [AMES, CASES ON TRUSTS, 2 ed., pp. 285, 345]; Nash *v.* Preston, Cro. Car. 191. See Burgess *v.* Wheate, *supra*, 218.

[9] FITZHERBERT'S ABRIDG., tit. SUBPŒNA, pl. 14, citing Y. B. 14 Ed. IV (1472) [AMES, CASES ON TRUSTS, 2 ed., n. 2, p. 345].

[10] Against donee: Y. B. 14 Hen. VIII, fol. 4, pl. 5; against purchaser with notice: Y. B. 55 Ed. IV (Mich.) 7; against creditor: *Ex parte* Chion, 3 P. Wms. 187, n. (A); against devisee: Marlow *v.* Smith, 2 P. Wms. 201. See also LEWIN, TRUSTS, 12 ed., pp. 275, 276; MAITLAND, EQUITY, pp. 117, 118.

[11] In the case of *disseisin* the courts first drew a distinction. It was said that the *disseisor* of the trustee was in by the *post* and not by the *per*, and so took free from any obligation. Earl of Worcester *v.* Finch, 4 Inst. 85. See Chudleigh's Case, 1 Rep. 120 *a*, 139 *b*; LEWIN, TRUSTS, 12 ed., 280. But that doctrine now seems to have been repudiated. *In re* Nesbitt and Potts' Contract, [1905] 1 Ch. 391; aff'd in Court of Appeals, [1906] 1 Ch. 386. See also MAITLAND, EQUITY, pp. 121, 170.

[12] NOTE 4, *supra*.

[13] See LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION, 6; MAITLAND, EQUITY, 122 *et seq.*; Hart, "The Place of Trust in Jurisprudence," 28 LAW QUART. REV. 290.

[14] See SALMOND, JURISPRUDENCE, 3 ed., 208.

[15] Case of Market Overt, 5 Co. R. 83 *b*.

[16] Money: Higgs *v.* Holiday, Cro. Eliz. 746; bank-note: Miller *v.* Race, 1 Burr. 452; promissory note: Grant *v.* Vaughan, 3 Burr. 1516; bill of exchange: Peacock *v.* Rhodes, Doug. 632.

[17] Odd-Fellows' Savings Bank *v.* Banton, 46 Cal. 603; O'Brien *v.* Fleckenstein, 180 N. Y. 350, 73 N. E. 30.

[18] See WILLISTON, SALES, § 319; MECHEM, SALES, § 168.

[19] See WILLISTON, SALES, § 352 *et seq.*; MECHEM, SALES, §§ 167, 981. A number

actions and acquisitions. Therefore the law has given the vendor in market overt, or the thief or finder of a promissory note, the power to pass a title which he himself does not possess. So in the case of trusts, in order to secure acquisitions of property equity concedes to the holder of the legal title, who stands before the world as owner, the power to clothe a purchaser for value without notice with a complete title.[20] Where is the anomaly in saying that *cestui's* rights are *in rem?* No doubt the *cestui* has a personal right against the trustee that he perform the trust in accordance with its terms, but it is submitted that primarily he has a real right in the *res* itself.[21]

This conception seems not only analytically sound but carries with it very salutary practical results. Under this view the many English and American cases [22] which prefer the *cestui* under a trust of an equitable interest (the legal estate being outstanding) to an assignee of the trustee for value and without notice are explainable, for the trustee then had nothing to assign; while if the *cestui's* right is merely *in personam* the assignee, having acquired the trustee's title for value without notice, should be protected.[23] Moreover, to work out the *cestui's* right to the *res* on the *in personam* doctrine where he is allowed to follow the *res* into the hands of successive holders either with notice or for no consideration is complicated and involved, while if the *cestui* is considered the real owner in equity the result is simple enough. He has an actual estate which can only be cut off by a sale to a *bonâ fide* purchaser. Simplicity of thought is always conducive to sound reasoning, and therefore much to be preferred to an over-refined theory full of difficulties which, although not insurmountable, are very misleading and often open the door to possible error.[24]

---

of the above instances are statutory. But that fact seems immaterial, for a statutory rule is no less a part of the legal system than a rule of the common law.

[20] Maitland distinguishes the case of a sale in market overt, etc., from that by a trustee, on the ground that in the former case the purchaser acquires an original title, while in the latter, a derivative title which equity will not take away. MAITLAND, EQUITY, 143. But the distinction seems formal only, for in either case it is a question of establishing an indefeasible title to secure the acquisition of property. The manner of creating that title seems immaterial.

[21] Nor is there any inherent difficulty in this twofold conception. A contract in the same way creates a personal obligation and a right *in rem*, — a right against the obligor specifically, and a right against everyone generally that the relationship shall not be disturbed.

For a further exposition of the theory that the *cestui's* right is *in rem* rather than *in personam*, see HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY (Harvard Univ. Press, 1915, — in press), and Professor Pound's Review of WILLOUGHBY, THE LEGAL ESTATE, in 26 HARV. L. REV. 462.

[22] Cave *v.* McKenzie, 46 L. J. Ch. 564; Cave *v.* Cave, *supra;* Cory *v.* Eyre, *supra;* Shropshire Rwys., etc. Co. *v.* The Queen, *supra;* Carritt *v.* Real and Personal Advance Co., 42 Ch. D. 263; *In re* Vernon, Ewens & Co., 33 Ch. D. 402; Trustees of Union College *v.* Wheeler, 61 N. Y. 88; Downer *v.* South Royalton Bank, 39 Vt. 25.

[23] See Professor Ames' article, "Purchase for Value without Notice," in 1 HARV. L. REV. 1, at pp. 11 and 12.

[24] A conspicuous example of the error into which some courts have fallen in attempting to follow out the *in personam* view to its logical conclusion is the case of Willson *v.* Louisville Trust Co., 102 Ky. 522, 44 S. W. 121. The trustee of an infant *cestui*, having wrongfully conveyed the *res* to another, allowed the Statute of Limitations to run against his right to recover the *res*. The court held that the *cestui*, having to work out his rights through the trustee, was barred because the trustee was barred, although

RECOVERY FOR INDIRECT INJURY CAUSED BY ACTION ON A THIRD PERSON. — Although sometimes disputed and frequently ignored,[1] it is a fundamental principle of the law of torts that intentional harm, unless justified, is actionable.[2] The failure clearly to recognize this principle apparently accounts for some confusion of reasoning in a recent case, in which a wife was denied recovery for loss of her husband's *consortium* and support against a defendant who first induced the husband to commit a crime, and then secured his conviction. *Nieberg* v. *Cohen*, 92 Atl. 214 (Vt.).[3] The court implies that it would have allowed recovery if there had been "intent to injure the wife," by which it apparently means if the act had been inspired by hostility to the wife. A few cases may support this distinction,[4] but it seems unsound and apparently arises from a confusion of motive and intent.[5] Harm is no less intentional when the tortfeasor merely knows that it will result from his act, than when his motive also is to inflict the harm.[6] But motive is an important factor in determining whether or not there is justification; or better, a bad motive may avoid an otherwise sufficient justification.[7] It is submitted, however, that if the act is a legal wrong to the third person, there can never be justification as to the plaintiff, and facts showing justification and motive are alike immaterial.[8] But where the act is not a wrong to

as to the *cestui* the statute had not begun to run. Such a result is a powerful argument against the doctrine for which it stands.

[1] Boyson *v.* Thorn, 98 Cal. 578, 33 Pac. 492; Bourlier Bros. *v.* Macauley, 91 Ky. 135, 15 S. W. 60; Ashley *v.* Dixon, 48 N. Y. 430. A failure to grasp this principle is evident in the opinions of Lord Watson and Lord Herschell in Allen *v.* Flood, [1898] A. C. 1, 96, 118. See also the dissenting opinions in Lumley *v.* Gye, 2 E. & B. 216, 246; and Bowen *v.* Hall, 6 Q. B. D. 333, 342.

[2] Walker *v.* Cronin, 107 Mass. 555; Beekman *v.* Marsters, 195 Mass. 205, 80 N. E. 817; Hughes *v.* McDonough, 43 N. J. L. 459; Angle *v.* Chicago, St. P., M. & O. R. Co., 151 U. S. 1; Tarleton *v.* McGawley, Peake N. P. Cases, 205; Quinn *v.* Leathem, [1901] A. C. 495, 510; South Wales Miners' Federation *v.* Glamorgan Coal Co., Ltd., [1905] A. C. 239. See also Bowen *v.* Hall, *supra*, 337; Vegelahn *v.* Guntner, 167 Mass. 92, 105, 44 N. E. 1077, 1080.

[3] A more complete statement of the facts of this case appears in RECENT CASES, p. 530. At common law a wife could not sue for loss of *consortium*, but under modern statutes enabling a married woman to sue in her own name, there seems no reason for refusing such an action, and ordinary general tort principles should apply. Flandermeyer *v.* Cooper, 85 Oh. St. 327, 98 N. E. 102. For a discussion of this question see 26 HARV. L. REV. 74.

[4] See McNary *v.* Chamberlain, 34 Conn. 384; Gregory *v.* Brooks, 35 Conn. 437; McCann *v.* Wolff, 28 Mo. App. 447; Jones *v.* Stanly, 76 N. C. 355.

[5] This confusion arises largely from the continual use of the word "malice" with every shade of meaning from intent to the worst kind of evil motive.

[6] This proposition must not be confused with the unsound but common statement that "every person is presumed to intend the reasonable consequences of his own act."

[7] An analogy to libel and slander is suggested. Justification, which may be the mere exercise of a legal right or competition, is analogous to privilege, and as malice avoids the privilege, so bad motive may avoid the justification. For a discussion of what may constitute justification, see Mogul Steamship Co. *v.* McGregor, Gow & Co., [1892] A. C. 25.

[8] The following example may explain the suggested distinction. If the defendant persuades a third party to refrain from entering into a contract with the plaintiff, competition may justify the injury to the plaintiff. But if, under the same conditions of competition, the defendant prevents the third party from entering into the contract by falsely imprisoning him, he should not be justified. This distinction is not expressly laid down in the cases, but it is submitted that it is sound and in accord with the decisions.